IN THE

Supreme Court of the United States

October Term, 1976

No. 76-616

THE STATE OF NEW YORK,

Appellant,

—against—

CATHEDRAL ACADEMY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Pursuant to this Court's request of December 14, 1976, appellee moves under Rule 16 to dismiss this appeal as not presenting a substantial federal question in light of *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), or, in the alternative, to affirm the order appealed from.

Opinions Below

The memorandum decision on July 13, 1976 of the Court of Appeals[1] is reported at 39 N.Y.2d 1021, 387 N.Y.S.2d 246, 355 N.E.2d 300. The dissenting opinion in the Appellate

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[1] Appendix A to Appellant's Jurisdictional Statement.

Division[2] which was adopted by the majority of the Court of Appeals is reported at 47 App.Div.2d 396-400, 366 N.Y.S. 2d 905-08.

Question Presented

Whether New York may, under *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), provide for the equitable reimbursement of nonpublic schools for the cost of services rendered in reliance upon a prior statute authorizing ultimate payment by the State and which services were planned and budgeted for and rendered, in part, prior to a District Court decision, later affirmed by this Court, that the statute was unconstitutional.

Statement of the Case

Chapter 996 of the 1972 Laws of New York[3] was enacted to correct an inequitable situation facing nonpublic schools in New York State which resulted from the coincidental timing of a decision of the United States District Court for the Southern District of New York, invalidating, on First Amendment grounds, the Mandated Services Act.[4] Pursuant to Chapter 996, appellee filed a claim for $7,347.29 against the State of New York for reimbursement of monies budgeted for and expended during the second semester of the 1971-1972 school year in connection with various record-keeping and testing services, payment of which would have been made but for the District Court's intervening decision and injunction.

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[2] Appendix B to Appellant's Jurisdictional Statement, pp. A10 to A16.

[3] Hereinafter "Chapter 996", Appendix E to Appellant's Jurisdictional Statement.

[4] [1970] Laws of N.Y. ch. 138.

The Mandated Services Act

In the Mandated Services Act, the Legislature had declared that the State had the "duty and authority to provide the means to assure, through examination and inspection . . . that all of the young people of the state, regardless of the school in which they [we]re enrolled, [we]re attending upon instruction as required by the education law and [we]re maintaining levels of achievement." [1970] Laws of N.Y. ch. 138, §1. Section 2 provided that, for school years beginning after July 1, 1970, qualifying nonpublic schools such as appellee would be reimbursed on an average daily attendance basis for the expenses incurred in providing various testing and record-keeping services which these schools were required by state law to perform. Section 5 provided that the schools would be reimbursed each year in two installments, half of such costs to be reimbursed between January 15 and March 15, with the balance to be paid to the schools between April 15 and June 15.

On June 30, 1970, an action was commenced in the District Court, challenging the Mandated Services Act as violative of the Establishment and Free Exercise Clauses of the First Amendment and seeking a permanent injunction against its enforcement. The plaintiffs did not move, however, for a temporary restraining order or preliminary injunction, as the District Court noted on January 28, 1971 in granting their motion to convene a three-judge District Court pursuant to 28 U.S.C. §§2281, 2284. *See Committee for Public Education & Religious Liberty* v. *Rockefeller,* 322 F. Supp. 678, 681 n.4 (S.D.N.Y. 1971).

A hearing was set for April 8, 1971, but it was not held, and there were no proceedings before the Court until more than a year later. The case was ultimately briefed and

argued on April 11, 1972. On April 27, 1972, the Court, by a two-to-one majority, held the Mandated Services Act unconstitutional as contravening the Establishment Clause. *See Committee for Public Education & Religious Liberty* v. *Levitt,* 342 F.Supp. 439 (S.D.N.Y. 1972). However, final judgment, permanently enjoining the State from reimbursing the nonpublic schools for expenses incurred during the spring 1972 semester was not entered until June 1, 1972 when the 1971-1972 school year was virtually at an end.

The defendants, including appellee, appealed to this Court, which noted probable jurisdiction on November 6, 1972,[5] heard oral argument on March 19, 1973 and affirmed over a dissent the judgment of the District Court on June 25, 1973. *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. 472.

During the approximately 22-month period between commencement of the action and determination by the District Court of the unconstitutionality of the Mandated Services Act, appellee, as well as other nonpublic schools, filed claims for reimbursement of the costs of rendering the mandated services for the school year 1970-1971 and received reimbursement therefor in two payments during 1971 pursuant to Section 5 of the Act. In budgeting and otherwise planning for the 1971-1972 school year, appellee relied upon the eventual receipt of reimbursement for the expenses of rendering the mandated services[6] and filed a claim for reimbursement for that year. In January 1972, appellee received from the State $7,347.28 in reimbursement for the first half of the 1971-1972 school year. Appellee expected to receive, and relied upon receiving, a second installment for providing the mandated services during the second half of the 1971-1972 school year. However, this payment was never made because of the District Court decision of April 27, 1972 and injunction of June 1, 1972.

[5] 409 U.S. 977.

[6] Reliance by appellee was specifically found by the New York Court of Claims. *See infra,* p. 6. The dissenting opinion in the Appellate Division adopted by the Court of Appeals reflects acceptance of this finding. *See infra,* pp. 7-9.

Chapter 996

Subsequent to the entry on June 1, 1972 of the District Court's permanent injunction in *Levitt,* enjoining enforcement of the Mandated Services Act, the Legislature enacted Chapter 996. This statute was enacted for the specific, but limited, purpose of correcting the inequitable situation in which nonpublic schools such as appellee had been placed due to the timing of the District Court's decision. Chapter 996 was designed to do equity to those nonpublic schools which had relied in budgeting and planning for the 1971-1972 school year upon receiving reimbursement for the total cost of rendering services mandated by the State, but which were prevented from being fully reimbursed.

Section 1 of Chapter 996 confers jurisdiction on the New York Court of Claims "to hear, audit and determine" claims of nonpublic schools such as appellee

> against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of health records, recording of personnel qualifications

> and characteristics and the preparation and submission to the state of various other reports required by law or regulation.

The core of the statute is the recognition that nonpublic schools relied in budgeting for the 1971-1972 school year on receiving reimbursement for all of the expenses incurred during that year in providing the services mandated by the State.

Prior Proceedings

On September 6, 1972, appellee filed its claim for $7,347.29 pursuant to Chapter 996. On November 20, 1973, appellee filed a motion for summary judgment, and the State cross-moved to dismiss the claim. The Court of Claims found as a matter of fact

> that the claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; *that claimant budgeted for, relied upon and filed a similar application* on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.[7]

[7] *Cathedral Academy* v. *State of New York*, 77 Misc.2d 977, 978, 354 N.Y.S.2d 370, 372 (N.Y.Ct.Cl. 1974) (emphasis added).

Nevertheless, the Court of Claims dismissed appellee's claim on the ground that the Establishment Clause rendered Chapter 996 unconstitutional. *Cathedral Academy* v. *State of New York*, 77 Misc.2d 977, 354 N.Y.S.2d 370 (N.Y.Ct.Cl. 1974).

Appellee's position was that, as a matter of federal constitutional law under *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973),[8] discussed below at pages 11-20, a state is not prohibited from reimbursing nonpublic schools for expenses incurred in good faith in reliance on a statute which at the time of enactment was not clearly unconstitutional, pending the resolution of litigation concerning the constitutionality of the statute. However, the Court of Claims held that, because this Court had declared the Mandated Services Act unconstitutional in *Levitt*, the granting of appellee's claim under Chapter 996 "would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional". 77 Misc.2d at 983, 354 N.Y.S.2d at 376.

The Appellate Division, by a 3-2 vote, affirmed the judgment of the Court of Claims. *Cathedral Academy* v. *State of New York*, 47 App.Div.2d 390, 366 N.Y.S.2d 900 (3d Dep't 1975). Presiding Justice Herlihy dissented on the ground that this case presented substantially the same situation as in *Lemon II*:

> Pursuant to chapter 996 . . ., there is to be a post-audit to determine whether or not the mandated services had in fact been performed by the claimant. While

[8] For the sake of clarity, this decision will be referred to hereinafter as *"Lemon II"*, and this Court's prior decision, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), holding the underlying Pennsylvania statute unconstitutional on First Amendment grounds, will be referred to as *"Lemon I"*.

it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the postaudit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant . . . . As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subsequent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a *moral* obligation to reimburse the schools for

monies already budgeted and expended. 47 App.Div.2d at 396-97, 366 N.Y.S.2d at 905-06 (footnote omitted; emphasis in original).

He found that, far from "resurrecting" the Mandated Services Act,

> the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services Act . . . and chapter 996 of the Laws of 1972 are readily distinguishable.[9]

Further:

> . . . [I]t is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II* . . . . Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 908, 366 N.Y.S.2d at 908.

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[9] 47 App.Div.2d at 398, 366 N.Y.S.2d at 907. The other dissenting opinion concluded as follows:

> The instant case comes directly within *Lemon II*. The interests of fairness and justice dictate upholding a one-time reimbursement for past services authorized by this statute. 47 App.Div.2d at 401-02, 366 N.Y.S.2d at 910.

On July 13, 1976, the New York Court of Appeals, by a 4-to-3 majority, rendered the following decision:

> Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 AD2d 390, 396).

The State appeals to this Court from this decision.

Jurisdiction

Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2), which provides that this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had as follows:

> . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellee concurs with appellant's contention at page 3 of its Jurisdictional Statement that the determination of the New York Court of Appeals is final as to the question of the constitutionality of Chapter 996, the underlying statute. Entry of judgment on behalf of appellee pursuant to this statute can no longer be foreclosed in any court of the State of New York on the ground that the judgment is violative of the Establishment Clause of the First Amendment. In addition, the Court of Appeals, by adopting the dissenting opinion of Presiding Justice Herlihy, which held that the Chapter 996 was not violative of the New York

Constitution, has clearly foreclosed any contrary decision by any court of state constitutional issues.

This Court has recently analyzed 28 U.S.C. §1257(2) in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-87 (1975). We submit that the case at bar falls at least within category one of this analysis because "the federal issue is conclusive"[10] and within category two of this analysis because

> the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings. 420 U.S. at 480.

See, e.g., Mills v. *Alabama,* 384 U.S. 214, 217-18 (1966); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 123-27 (1945). *See also Construction Laborers* v. *Curry,* 371 U.S. 542 (1963).

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The only question presented on this appeal is the application of the facts of this case to the constitutional principles enunciated in *Lemon II.* The New York Court of Appeals found the facts to be substantially similar to those of *Lemon II* and reversed summarily. Appellee submits that the facts of this case are virtually identical to those of *Lemon II:* Since the Court of Appeals correctly applied *Lemon II;* since the decision below does not conflict with other decisions of this Court or other courts; and since the question presented only involves the application of facts

[10] 420 U.S. at 479.

to settled principles of federal law, no substantial federal question is presented.

In *Lemon II,* this Court held that the Establishment Clause does not prohibit a state from paying funds on a limited, one-time basis to nonpublic schools which had relied in good faith upon receipt of such funds pursuant to a state statute which was subsequently held to be unconstitutional, but as to which there had been a reasonable basis for presuming the statute to be valid.

The *Lemon* case arose out of Pennsylvania's enactment in 1968 of the Nonpublic Elementary and Secondary Education Act[11] which authorized reimbursement of nonpublic schools for the salaries of teachers of mathematics, modern foreign languages, physical science and physical education. The nonpublic schools were reimbursed "in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered". Act 109, §7(a), Pa. Stat. tit. 24, §5607(a). In January 1969, Pennsylvania entered into contracts with nonpublic schools to purchase services for the 1968-1969 school year.

In June 1969, an action was brought, seeking declaratory and permanent injunctive relief against enforcement of Act 109. The plaintiffs filed, but subsequently abandoned, a motion for a preliminary injunction. On November 29, 1969, a three-judge District Court granted a motion to dismiss the complaint. *Lemon* v. *Kurtzman,* 310 F.Supp. 35 (E.D.Pa. 1969). The plaintiffs appealed to this Court,

[11] [1968] Laws of Pa. No. 109, Pa. Stat. tit. 24, §§5601-09 [hereinafter "Act 109"].

which ultimately heard oral argument on March 3, 1971. On June 28, 1971, the Court, by a divided vote, declared the statute violative of the Establishment Clause on the ground that the state was constitutionally compelled to assure that the payments were not being used for religious indoctrination and that the ongoing surveillance necessary to accomplish this result created an excessive entanglement between church schools and the state. *Lemon I,* 403 U.S. 602 (1971).

The case was thereupon remanded to the District Court, which in December 1971 entered an order enjoining the defendants "from making payments for services performed or costs incurred *for any period subsequent to June 28, 1971*". *Lemon* v. *Kurtzman,* 348 F.Supp. 300, 201 n.1 (E.D. Pa. 1972) (emphasis added). Because payments for services rendered during the 1970-1971 school year were to be made in September and December of 1971, the effect of the order was to permit the state to reimburse nonpublic schools for the second semester of the 1970-1971 school year in December 1971, a date well after this Court had held the underlying statute to be unconstitutional.

The plaintiffs argued in the District Court that no payments could be made subsequent to the date of the decision of this Court. The three-judge District Court unanimously rejected this argument, finding no constitutional impediment to reimbursement after the statute was held unconstitutional for services rendered prior to that declaration. The court stressed the equitable considerations of the nonpublic schools' "reliance" on reimbursement for the entire 1970-1971 school year by "adjust[ment of] their budgets accordingly and perform[ance of] the services required by them." 348 F.Supp. at 304.

The plaintiffs again appealed to this Court, which affirmed in *Lemon II* the District Court's judgment. The Court rejected, as a principle of constitutional law, the argument that payments subsequent to a declaration of unconstitutionality of an underlying statute were invalid *per se* under the Establishment Clause, but rather viewed the matter as the "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." 411 U.S. at 198. This process is, the Court explained, equitable in nature:

> In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private need." . . .
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 200, 201 (citations and footnotes omitted).

This Court thus enunciated a test of balancing "constitutional" and "reliance" interests in determining whether reimbursement is permissible after a declaration of invalidity for services rendered in good faith prior to that judicial declaration. As for the constitutional interests, the Court, after noting that "[t]he constitutional fulcrum of *Lemon I* was the excessive entanglement of church and

state," observed that the one-time payment of $24,000,000 to nonpublic schools "will not substantially undermine the constitutional interests at stake in *Lemon I*." 411 U.S. at 201. This Court noted problems having constitutional "overtones", but held that they were "minimal" or outweighed by "reliance" considerations. Rejecting the contention that the remaining final audit would engender excessive entanglement, the Court observed:

> . . . [T]here is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I*. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is not present risk of significant intrusive administrative entanglement, since only a final postaudit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971. 411 U.S. at 202-03 (footnote omitted; emphasis in original).

This Court, in applying the balancing test, then considered the "private" or "reliance" interest involved:

> Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. 411 U.S. at 203 (footnote omitted).

The Court found there was sufficient evidence in the record of such reliance and emphasized that:

> The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. 411 U.S. at 204.

With respect to the issue of reliance, the plaintiffs argued that the nonpublic schools should not have relied on reimbursement because of the "constitutional cloud" over the statute and because the constitutionality of Act 109 had not been finally adjudicated when the contracts for the 1970-1971 school year were made. This Court held that the unconstitutionality of Act 109 had not been clearly foreshadowed by prior decisions[12] and rejected a rule of law that

> would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. 411 U.S. at 207.

[12] *See* 411 U.S. at 206-07 n.7.

The Court held that the equities of reliance by the nonpublic schools on the expectation of reimbursement outweighed the "remote possibility of constitutional harm" and affirmed the judgment of the District Court.

Appellee submits that *Lemon II* is controlling on the substantive issue involved in this appeal and that there is no proper basis for any significant distinction between that case and the case at bar. First, the Court of Claims found as a fact that appellee relied in its budgeting and other plans for the 1971-1972 school year upon the expectation of reimbursement under the Mandated Services Act for services rendered during the second half of the 1971-1972 school year.[13] In addition, the plaintiffs in *Levitt,* like those in *Lemon,* sought no preliminary injunctive relief, thus postponing any ruling at the District Court level on the merits of the constitutionality of the Mandated Services Act for almost 22 months. That this decision not to move for preliminary relief was motivated by "tactical considerations" as in *Lemon* is not unlikely.

Second, the decision of this Court in *Levitt,* as in *Lemon I,* was not "clearly foreshadowed" by prior decisions. The entire area of permissible or impermissible aid to nonpublic schools, or to the pupils in these schools or their parents, has been the subject of continuous development under the Constitution. Any claim that the outcome of the Mandated Services Act litigation in the *Levitt* case was clearly foreshadowed either in the District Court or in this Court is simply naive. This is clearly shown by

[13] *See supra,* p. 6. Indeed, this Court indicated in *Lemon II* that reliance by nonpublic schools in circumstances such as these can be assumed. *See* 411 U.S. at 205 and n.6.

several events relating to that case. A three-judge District Court was convened to decide the constitutionality of the Mandated Services Act, then an appropriate procedure only if a substantial constitutional question—not decided by prior litigation—existed. The District Court's decision was not unanimous; one judge filed a vigorous dissent. When the defendants appealed, this Court did not summarily affirm the District Court's order, but rather required full briefing and oral argument. Finally, not only was there a dissent, but even the opinion of this Court indicated that reimbursement for certain required services may be constitutional. *See* 413 U.S. at 482.[14]

Therefore, for purposes of the balancing test set forth in *Lemon II,* there can be no doubt that appellee did rely on being reimbursed for the costs of rendering the services mandated by the State and that appellee's reliance on the presumptive validity of the Mandated Services Act was justifiable. New York's highest court did not hold otherwise.

Appellant herein argues at page 18 of its jurisdictional statement that an "audit" within the meaning of Section 1 of Chapter 996 of appellee's claim by the Court of Claims would entail "excessive entanglement with religion in the auditing function". This rigid position ignores the fact that *Lemon II* represents an effort by this Court to take, in limited circumstances where reliance and ensuing hardship can be shown in connection with statutes which are not patently unconstitutional, a flexible approach whereby

[14] In addition, the concurring opinion considered that affirmance was compelled by two decisions of the Court which were handed down on the very same day as that in *Levitt*. *See* 413 U.S. at 482.

hardships can be ameliorated without significant constitutional injury. Neither the purpose of the Establishment Clause, nor the equitable basis of *Lemon II* nor simple logic requires that application of *Lemon II* be limited to situations admitting of absolutely no variations from its factual pattern.

Lemon II does not require that courts apply to a case involving final equitable reimbursement the same three constitutional tests[15] which are applied in evaluating the validity of original legislation. Rather, *Lemon II* involved a balancing of considerations relating to justifiable reliance by the schools and those relating to the nature and degree of possible injury to Establishment Clause values.

There is no prospect of "tangible" or substantial constitutional injury under Chapter 996 for several reasons: First, a one-time payment, as this Court recognized in *Lemon II,* presents a relatively small potential for constitutional injury. Indeed, the Court, in formulating its balancing test, referred to the payment of the final installment of $24,000,000 under the Pennsylvania statute as involving a "remote possibility of constitutional harm".[16] Secondly,

[15] *See, e.g., Lemon I,* 403 U.S. at 612-13; *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 772-73 (1973).

[16] 411 U.S. at 203. As this Court stated in *Hunt* v. *McNair,* 413 U.S. 734 (1973):

> . . . [T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. 413 U.S. at 743.

See also Roemer v. *Board of Public Works of Maryland,* 49 L. Ed.2d 179, 188 n. 14 (1976), and cases cited therein.

all services reimbursable in this case were performed and paid for by the nonpublic schools out of their own funds over four years ago during the winter and spring of 1972 so that there is no risk of any furtherance of sectarian activity at this time. Finally, the "remote possibility of constitutional harm" discussed by this Court in *Lemon II* is even more remote here. To quote from the dissenting Appellate Division opinion of Presiding Justice Herlihy, adopted as the majority opinion of the Court of Appeals:

> . . . [T]he burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 400, 366 N.Y.S.2d at 908.

In short, this one-time equitable reimbursement cannot, by any stretch of the imagination, constitute a threat to the principles of the First Amendment. What is involved is simply limited equitable relief to appellee in an unusual situation in which it finds itself by reason of its good faith reliance on the validity of the Mandated Services Act.

Conclusion

In view of the foregoing, the appeal herein should be dismissed for lack of a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: January 12, 1977

Respectfully submitted,

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